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From:

Sent: Friday, September 12, 2008 3:20:16 PM

To:

Cc:

Subject: RE: Section 6323 question

This advice has been reviewed by my reviewer

Our response to your incoming email is based on the following factual situation from your email to us and our conversation this afternoon.

The IRS assesses a tax liability against the taxpayer and subsequently files notices of federal tax lien in the appropriate offices. The Service then serves a continuing wage levy on the taxpayer's employer. Subsequent to the serving of the wage levy, taxpayer requests a loan from the employer to be payed back through deductions from the taxpayer's bi-weekly pay.

Once the Service has assessed a tax liability and the taxpayer fails to pay the liability after notice and demand, a lien attaches to all property and rights to property of the taxpayer. I.R.C. 6321. If the taxpayer fails to pay a liability within ten days of notice and demand, the Service may collect the liability by levy on all property and rights to property of the taxpayer, including salary or wages. I.R.C. 6331(a). With respect to a levy on salary or wages, a levy shall be continuous from the date the levy is first made until it is released. I.R.C. 6331(e). Treas Reg. 301.6331-1 provides that a continuous "levy attaches to. . . salary or wages earned but not yet paid at the time of the levy" and "has continuous effect from the time the levy originally is made until the levy is released."

Legally, the employer must satisfy the Service's continuing wage levy each pay period before it deducts money from the employee/taxpayer's wages to recoup its loan to the employee/taxpayer. The continuing wage levy effectively seized the employee/taxpayer's wages each pay period from the date the levy originally was made---before the employee requested the loan from the employer.

As we discussed on the phone, there are some extra-legal considerations. Policy Statement 5-25 (IRM 1.2.14.1.6) provides that although legally the levy attaches to the gross amount of the wages or salary, the Service will consider the levy as attaching only to the taxpayer's "take home" pay unless the taxpayer is voluntarily allotting his/her pay to an extent that would defeat the purpose of the levy. As a matter of policy in these situations, the RO should determine the purpose of the proposed loan. If its purpose is to feed the taxpayer's small children, as a matter of policy the Service may want to subordinate some of its right to the wages to the payment of the loan. If the taxpayer wants the loan to buy a sports car, the Service obviously would not be willing to subordinate its right to the wages. When considering this, also consider that the taxpayer already has been allotted wage and salary exemptions under section 6334.

The RO in a case like this should also consider the relationship between the employee and the employer. Is the proposed loan an arms length agreement between an "independent" employer," or is the "employer" solely owned by the employee.

Finally, if the employer and employee have a written agreement for the loan but the loan has not yet been made, the Service may be able to levy on the loan agreement. And the Service may always levy on the taxpayer once he/she receives the loan proceeds.

Most importantly, the Service is in a good position here legally. The wage levy attached to all wages on the date it was made, effectively seizing the wages before any loan was ever considered; however, as a matter of policy, the facts of the particular case should be considered.